(16)

No. 03-1566

In the Supreme Court of the United States

FRANCIS A. ORFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant To The Solicitor General

TODD S. AAGAARD
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioners are California farmers who purchase irrigation water from the Westlands Water District. They sued the United States and federal officials for money damages, alleging that the United States, which supplies water to the Westlands Water District in accordance with a water service contract that the United States entered into under the federal reclamation laws, breached its contractual obligations to Westlands. The question presented is:

Whether the court of appeals correctly determined that petitioners could not sue the United States for an alleged breach of Westlands' contract with the United States because petitioners are not intended third-party beneficiaries of that contract.

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly identified in petitioners' brief (Br. ii), except that the current Secretary of the Interior is Gale Norton and the current Secretary of Commerce is Donald L. Evans. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
A. The federal reclamation laws	3
B. The California Central Valley Project	7
C. The current dispute	10
Summary of argument	14
Argument:	
Petitioners cannot sue the United States for an alleged breach of the Westlands Contract because petitioners are not intended third-party beneficiaries of that contract	16
A. Congress has neither authorized the Secretary of the Interior to grant petitioners third-party rights to enforce the Westlands Contract nor empowered the courts to enforce such rights	16
1. Congress authorized the Secretary of the Interior to contract only with the irrigation districts	17
2. Congress waived the United States' immunity from suit only for claims brought by the irrigation districts against the United States	20
B. The Westlands Contract, by its terms, does not grant petitioners a right to sue the United States for breach of that contract	25
1. A third party cannot enforce a contract unless the contracting parties express their intention to confer that right	25

Table of Contents—Continued:

	Page
2. Petitioners concede that the Westlands Contract does not grant them an express right to sue the United States	31
C. Neither the Westlands Contract nor any extra-contractual source impliedly grants petitioners the right to sue the United States for breach of the Westlands Contract	35
1. Article 15 of the Westlands Contract does not grant petitioners an implied right to sue the United States	36
2. The other Westlands Contract provisions that petitioners cite do not grant petitioners an implied right to sue the United States	38
3. The "surrounding circumstances" of the Westlands Contract do not imply that petitioners are entitled to sue the United States for breach of that contract	40
4. The 1986 Judgment does not give petitioners a right to sue the United States for breach of the Westlands Contract	44
5. The 1986 Judgment has no claim-preclusive or issue-preclusive effect on the matters before this Court	46
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001)	33
American Paper Inst., Inc. v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)	19
Arizona v. *California*, 530 U.S. 392 (2000)	46, 47

Cases—Continued: Page

Barcellos & Wolfsen, Inc. v. *Westlands Water Dist.*:
491 F. Supp. 263 (E.D. Cal. 1980) 9, 23, 47, 48
899 F.2d 814 (9th Cir.), cert. denied, 498 U.S. 998 (1990) 48
849 F. Supp. 717 (E.D. Cal. 1993), aff'd *sub nom.*, *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir. 1995), cert. denied, 516 U.S. 1028 (1995) 11, 48
Broad v. *Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996) 46
California v. *United States*, 438 U.S. 645 (1978) 3, 41, 43
Catlin v. *United States*, 324 U.S. 229 (1945) 47
Central Green Co. v. *United States*, 531 U.S. 425 (2001) 7
Chauffeurs, Teamsters & Helpers, Local No. 391 v. *Terry*, 494 U.S. 558 (1990) 44
City of Fresno v. *California*, 372 U.S. 627 (1963) 6
Correctional Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 32
Corrugated Paper Prod., Inc. v. *Longview Fibre Co.*, 868 F.2d 908 (7th Cir. 1989) 44
County of San Joaquin v. *State Water Res. Control Bd.*, 63 Cal. Rptr. 2d 277, 285 n.12 (Ct. App. 1997) 42
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 20, 22
Department of Ecology v. *United States Bureau of Reclamation*, 827 P.2d 275 (Wash. 1992) 35
Dugan v. *Rank*, 372 U.S. 609 (1963) 48
Durkin v. *Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996) 48
Eastern Transp. Co. v. *United States*, 272 U.S. 675 (1927) 20
Edmonds v. *Compagnie Gen. Transatlantique*, 443 U.S. 256 (1979) 20
FDIC v. *Meyer*, 510 U.S. 471 (1994) 33
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112 (1896) 27

Cases—Continued: Page

First Pac. Bancorp v. *Helfer*, 224 F.3d 1117 (9th Cir. 2000) 46
Fox v. *Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943) 34
Franco v. *Selective Ins. Co.*, 184 F.3d 4 (1st Cir. 1999) 47
German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U.S. 220 (1912) 19, 20, 26, 27, 28
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 32, 33
Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 32
Grigerik v. *Sharpe*, 721 A.2d 526 (Conn. 1998), cert. denied, 747 A.2d 2 (Conn. 2000) 31
Henderson County Drainage Dist. No. 3 v. *United States*, 53 Fed. Cl. 48 (2002) 35
H.F. Allen Orchards v. *United States*, 749 F.2d 1571 (Fed. Cir. 1984), cert. denied, 474 U.S. 818 (1985) 33, 34
Ickes v. *Fox*, 300 U.S. 82 (1937) 41, 43
Israel v. *Morton*, 549 F.2d 128 (9th Cir. 1977) 42
Joerger v. *Pacific Gas & Elec.*, 276 P. 1017 (Cal. 1929) 42
Klamath Water Users Protective Ass'n v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000) 13, 33
La Preferida, Inc. v. *Cerveceria Modelo*, 914 F.2d 900 (7th Cir. 1990) 47
Laclede Inv. Corp. v. *Kaiser*, 596 S.W.2d 36 (Mo. Ct. App. 1980) 31
Lane v. *Peña*, 518 U.S. 187 (1996) 20, 22, 23
Lenz v. *Chicago & N.W. Ry.*, 86 N.W. 607 (Wis. 1901) 30
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 33
Midlantic Nat'l Bank v. *New Jersey Dep't of Envtl. Pro.*, 474 U.S. 494 (1986) 20

Cases—Continued: Page

Montana v. *United States*, 124 F.3d 1269 (Fed. Cir. 2003) 25
National Bd. of Examiners for Osteopathic Physicians & Surgeons, Inc. v. *American Osteopathic Ass'n*, 645 N.E.2d 608 (Ind. Ct. App. 1994) 31
Nebraska v. *Wyoming*, 325 U.S. 589 (1945) 43
Nevada v. *United States*, 463 U.S. 110 (1983) 3, 43
O'Neill v. *United States*, 50 F.3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995) 9, 48
Office of Pers. Mgmt. v. *Richmond*, 496 U.S. 414 (1990) 17, 23
Salyer Land Co. v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) 27
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 26
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 33
Trient Partners I Ltd. v. *Blockbuster Entm't Corp.*, 83 F.3d 704 (5th Cir. 1996) 21, 30, 44
Turlock Irrigation Dist. v. *Hetrick*, 81 Cal. Rptr. 2d 175 (1999) 27
United States v. *Alire*, 73 U.S. (6 Wall.) 573 (1867) 20
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) 7
United States v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) 23
United States v. *Seckinger*, 397 U.S. 203 (1970) 26
United States v. *Sherwood*, 312 U.S. 584 (1941) 20
United Steelworkers v. *Rawson*, 495 U.S. 362 (1990) 32
Vikingstad v. *Baggott*, 282 P.2d 824 (Wash. 1955) 31
Westlands Water Dist. v. *Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993) 24

Cases—Continued: Page

Wyoming v. *United States*, 933 F. Supp. 1030 (D. Wyo. 1996) 22, 24

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 7 17
Amend. V:
Due Process Clause 11
Just Compensation Clause 11
Act of Aug. 9, 1912, ch. 278, 37 Stat. 265:
§ 1, 37 Stat. 265 3
§ 2, 37 Stat. 266 3
Act of May 15, 1922, ch. 190, 42 Stat. 541 4
§ 1, 42 Stat. 541 4
§ 2, 42 Stat. 542 4
Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649 4
Act of Aug. 4, 1939, ch. 418, § 9, 53 Stat. 1193 6
Anti-Deficiency Act, 31 U.S.C. 1341 17
California Bay-Delta Environmental Enhancement and Water Security Act, Pub. L. No. 104-208, Div. E, Tit. I, 110 Stat. 3009-748 7
Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4706 10
§ 3402(f), 106 Stat. 4706 10
§ 3406(b)(2), 106 Stat. 4715-4716 10
§ 3406(d)(1), 106 Stat. 4722-4724 10
Emergency Relief Appropriations Act of 1935, ch. 48, 49 Stat. 115 7
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 10
McCarran Amendment, 43 U.S.C. 666(a) 48
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 3
Reclamation Act of 1902, ch. 1093, 32 Stat. 388 ..... 2, 3
§§ 2-10, 32 Stat. 388-390 3
§ 8, 32 Stat. 390 3
Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263 9
§ 221, 96 Stat. 1271 ..... 9, 21, 48

Statutes and rules—Continued: Page

Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850 7
Tucker Act:
28 U.S.C. 1346 25
28 U.S.C. 1346(a)(2) 25
28 U.S.C. 1491 25
28 U.S.C. 1491(a)(1) 25
43 U.S.C. 372 42
43 U.S.C. 383 41
43 U.S.C. 390uu ..... *passim*
43 U.S.C. 391 6
43 U.S.C. 423e 6, 7, 8, 18, 19, 20, 26, 27
43 U.S.C. 423f 6
43 U.S.C. 492 6
43 U.S.C. 493 6
43 U.S.C. 511 4
43 U.S.C. 512 4
43 U.S.C. 541 3
43 U.S.C. 542 3
Cal. Water Code Ann. (West):
§ 1225 (1971) 41
§ 35420 (1984) 27
Westlands Water District Merger Law, Cal. Water Code §§ 37800-37856 (West 1982 & Supp. 2004) 8
Fed. R. Civ. P. 19(a) 22

Miscellaneous:

17A Am. Jur. 2d *Contracts* (2001) 31
Comment Note, *Right of Third Person to Enforce Contract Between Others for His Benefit*, 81 A.L.R. 1271 (1932) 31
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62 Cong. Rec. (1922):
p. 3573 4
p. 3574 5
p. 3575 4
p. 5859 5
128 Cong. Rec. 8816 (1982) 20

Miscellaneous—Continued: Page

Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992) 30
55 Fed. Reg. 46,515 (1990) 11
58 Fed. Reg. 12,854 (1993) 10
4 William Fratcher, *Scott on Law of Trusts* (4th ed. 1987) 44
General Accounting Office, Rep. No. 81-07, *Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs* (1981) 6
General Accounting Office, Rep. No. 96-109, *Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects* (1996) 6
H.R. Conf. Rep. No. 855, 97th Cong., 2d Sess. (1982) 4, 5
H.R. Rep. No. 662, 67th Cong., 2d Sess. (1922) 22
H.R. Rep. No. 458, 97th Cong., 2d Sess. (1982) 42
Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, Revised Decision 1641 (Cal. St. Water Res. Control Bd. 2000) (www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf) 30
Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63 (1989) 26, 28, 29, 32
Restatement (Second) of Contracts (1981) 44
Restatement (Second) of Trusts 22
S. Rep. No. 373, 97th Cong., 2d Sess. (1982) 9
Westlands Water District—Legal Questions, Solicitor Opinion No. M-36901, 85 Interior Decision 297 (1978) 9
Westlands Water District, Solicitor Opinion M-36901 (Supp. I) (June 17, 1986) 29
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 358 F.3d 1137. The opinion and order of the district court on the United States' motion for reconsideration (Pet. App. 23a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2004. The petition for a writ of certiorari was filed on May 18, 2004, and was granted on October 12, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the federal reclamation laws are set out in the addendum to this brief.

STATEMENT

Congress enacted the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, and subsequent related legislation, to provide federal financing, construction, and operation of water storage and distribution projects. The California Central Valley Project (CVP), which provides irrigation water to state water districts for distribution to occupants of arid lands in California, is one such reclamation project. In recent years, the United States has reduced the amount of CVP irrigation water that it delivers to some state water districts, such as the Westlands Water District (Westlands), to comply with congressional mandates respecting endangered and threatened fish and wildlife.

Petitioners, who are individual farmers and farming entities that purchase CVP irrigation water from Westlands, filed suit against the United States and various federal officials, alleging that the reduced water deliveries breach a 1963 water service contract between the United States and Westlands (the Westlands Contract). Petitioners, who claim the right to enforce the Westlands Contract as intended third-party beneficiaries, sought money damages for the alleged breach. The district court held that petitioners could not sue for violation of the Westlands Contract because they are neither parties to, nor intended third-party beneficiaries of, that contract. Pet. App. 23a-46a. The court of appeals affirmed in relevant part, holding that, because the United States and Westlands expressed no intent that petitioners would have the right to enforce the Westlands Contract, petitioners are not intended third-party beneficiaries of that contract. *Id.* at 9a-14a.

A. The Federal Reclamation Laws

Congress's enactment of the Reclamation Act of 1902 initiated "a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California* v. *United States*, 438 U.S. 645, 650 (1978). Congress originally envisioned that the United States would "withdraw from public entry arid lands in specified Western States, reclaim the lands through irrigation projects," and then "restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself." *Nevada* v. *United States*, 463 U.S. 110, 115 (1983). Congress specifically directed, in Section 8 of the Reclamation Act of 1902, that the United States would act in accordance with state law to acquire title to the water used. 32 Stat. 390 (codified in part at 43 U.S.C. 383). See *California*, 438 U.S. at 650-651.

Congress gave the Department of the Interior responsibility for constructing reclamation projects and for administering the distribution of water to agricultural users in a project service area. See Reclamation Act of 1902, ch. 1093, §§ 2-10, 32 Stat. 388-390. Congress further provided, under a 1912 amendment of the 1902 Act, that individual water users served by a reclamation project could acquire a "water-right certificate" by proving that they had cultivated and reclaimed the land to which the certificate applied. Act of Aug. 9, 1912, ch. 278, § 1, 37 Stat. 265 (43 U.S.C. 541). Congress required that the individual's land patent and water right certificate would "expressly reserve to the United States a prior lien" for the payment of sums due to the United States in connection with the reclamation project. § 2, 37 Stat. 266 (43 U.S.C. 542).

In 1922, Congress enacted legislation permitting the United States to contract with "any legally organized irrigation district," rather than with the individual water users. Act of May 15, 1922, ch. 190, § 1, 42 Stat. 541 (43 U.S.C. 511). In that situation, the United States would be entitled to release liens against individual landowners, provided that the landowners agreed to be subject to "assessment and levy for the collection of all moneys due and to become due to the United States by irrigation districts formed pursuant to State law and with which the United States shall have entered into a contract therefor." § 2, 42 Stat. 542 (43 U.S.C. 512). In 1926, Congress enacted additional legislation providing that, thenceforth, the United States may enter into contracts for new reclamation projects *only* with "an irrigation district or irrigation districts organized under State law." Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649 (codified as amended at 43 U.S.C. 423e). As a result of the 1926 legislation, the United States was to contract exclusively with irrigation districts, and those irrigation districts would then be responsible for discharging the contractual obligations.[1]

[1] The legislative history of the 1922 act, which allowed the government to contract with irrigation districts, shows that Congress recognized that there would be significant operational differences in dealing with irrigation districts rather than directly with individual farmers. See H.R. Rep. No. 662, 67th Cong., 2d Sess. 2 (1922) ("the Federal Government is dealing with the irrigation district instead of the individual owner or water users' association"); 62 Cong. Rec. 3573 (1922) (statement of Rep. Kinkaid) ("This language authorizes the taking of the district collectively, taking the lands of the district collectively, for the payment of the cost of the construction of the irrigation works, in lieu of holding each farm unit singly for its proportionate share of the cost of construction."); *id.* at 3575 (statement of Rep. Mondell) ("The Reclamation Service has for years encouraged the organization of irrigation districts

Congress envisioned that structuring reclamation contracts as enforceable obligations between the United States and the irrigation districts would better suit the needs of all concerned. The United States benefitted from contracting with irrigation districts because the districts provided the United States with a centralized and more reliable source for repayment of the project costs. The irrigation districts—which, by virtue of their taxation or assessment authority under state law, could collect reclamation charges from the individual landowners—had enhanced power to negotiate and seek enforcement of contracts and to resolve any ensuing disputes based on the collective interests of the landowners within the district's geographic boundaries. They also brought local governmental control and responsibility to the reclamation effort. And the individual water users benefitted because they would not incur direct individual contractual responsibilities to a distant national government, and they would not be subject to burdensome liens on their lands.[2]

* * * whereby the water users as a body, as a whole, become responsible for all of the charges.") *id.* at 5859 (statement of Sen. McNary) ("the Government is dealing with organized irrigation districts rather than the various individual entrymen who take water in the projects").

[2] See H.R. Rep. No. 662, *supra*, at 1 (noting the legislation's "beneficial effects"); 62 Cong. Rec. at 3574 (statement of Rep. Hayden) (irrigation districts would provide "vastly better security for the repayment of the sums due to the United States," whereas by avoiding liens, individual water users would qualify for federal farm loans); *id.* at 5859 (statement of Sen. McNary) ("In a word, it is to the advantage of the Federal Government and the entrymen and water users in various irrigation districts. * * * [T]he Government takes the bonds of the district rather than the securities of the individual entrymen."). In 1939, Congress authorized the United States to enter into water-service contracts and repayment

Congress expected that the reclamation laws, which require the irrigation districts to reimburse the United States for water delivery costs through long-term water service contracts, would produce a financing mechanism that would allow the government to recoup the costs of constructing and operating the reclamation projects. See 43 U.S.C. 391, 492, 493, 423e, 423f. The financing mechanism, however, has generally provided inadequate funds to achieve that goal. In the case of the CVP, the United States' water service contracts with the irrigation districts are insufficient to return more than a fraction of the project's costs. See *City of Fresno* v. *California*, 372 U.S. 627, 631 (1963).[3]

contracts with organizations other than irrigation districts, in recognition that reclamation projects such as the CVP were being used for purposes other than storing and delivering water for irrigation, such as municipal water supply and electric power generation. Act of Aug. 4, 1939, ch. 418, § 9, 53 Stat. 1193 (43 U.S.C. 485h). But Congress retained Section 423e's requirement that, insofar as reclamation is concerned, the Bureau must contract with irrigation districts rather than individual irrigators.

[3] Congressional studies have concluded that shortfalls under the reclamation program have arisen because: (1) Congress has spread project repayment obligations over several decades, but has not required payment of interest on the costs of the project; (2) Congress has limited the repayment obligation to only those costs that are considered within the irrigation district's ability to pay; and (3) Congress has enacted charge-offs that selectively eliminate portions of the repayment obligations in the case of certain projects. See General Accounting Office, Rep. No. 96-109, *Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects* 15-22 (1996); General Accounting Office, Rep. No. 81-07, *Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs* 11 (1981).

B. The California Central Valley Project

The CVP is "a gigantic undertaking to redistribute the principal fresh-water resources of California" and, specifically, to "to re-engineer" the "natural water distribution" of California's Central Valley. See *Central Green Co.* v. *United States*, 531 U.S. 425, 432-433 (2001) (quoting *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 728 (1950)). The CVP includes a collection of dams, reservoirs, hydropower generating stations, canals, electric transmission lines, and other infrastructure used to accomplish the project's purposes. See *id.* at 433 (citing *Gerlach*, 339 U.S. at 733). Congress initially authorized funds for the CVP in the Emergency Relief Appropriations Act of 1935, ch. 48, 49 Stat. 115. Congress reauthorized the Project as a federal reclamation project in the Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850. It has since amended or supplemented the 1937 Act many times. See, *e.g.*, California Bay-Delta Environmental Enhancement and Water Security Act, Pub. L. No. 104-208, Div. E, Tit. I, 110 Stat. 3009-748 (1996).

In 1963, the Department of the Interior's Bureau of Reclamation, acting pursuant to provisions of the federal reclamation laws authorizing contracts between the United States and state irrigation districts, 43 U.S.C. 423e, entered into a long-term water service contract with the Westlands Water District (Westlands). Pet. App. 3a; J.A. 30-88. At the time, the United States was in the process of constructing the San Luis Unit of the CVP. See Appellants Excerpt of Record (AER) 138. The Westlands Contract specifies that the United States shall furnish water to Westlands from the San Luis Unit and that Westlands shall pay

for that water. J.A. 34-36, 38-39. Article 3 of the Westlands Contract specifies the quantities of water to be sold annually. See J.A. 34. Article 11(a) of the Westlands Contract releases the government from liability for water shortages caused by "errors in operation, drought, or any other causes." See J.A. 42-43.[4]

The United States and Westlands fully satisfied their contractual obligations under the Westlands Contract for 15 years without major controversy. Except for one year of drought, the CVP delivered a minimum of 900,000 acre-feet of water annually to petitioners and other water users within Area I of the Westlands District.[5] In 1978, however, the Solicitor of the Interior issued an opinion stating that the Bureau of Reclamation could not lawfully deliver water under the

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[4] Because Congress sought, through federal reclamation projects such as the CVP, to encourage the development of small family farms and to discourage land speculation, it placed restrictions on the delivery of federal reclamation water to larger landowners. See 43 U.S.C. 423e. Article 25 of the Westlands Contract—like other federal reclamation contracts—limits the water that would be made available to persons who own more than 160 acres (or, for a married couple, 320 acres) of irrigable land within the Westlands Water District. J.A. 51-52. Article 25 specifies that, before receiving any water made available under the Westlands Contract, each such landowner must execute a "valid recordable contract" with the United States that, among other things, requires the landowner to dispose of the "excess land" within ten years. *Ibid.* Many of the landowners within the Westlands Water District executed such contracts. AER 231-241.

[5] The current Westlands Water District was formed in 1965 by the merger of the Westlands and Westplains Water Districts. See Westlands Water District Merger Law, Cal. Water Code §§ 37800-37856 (West 1982 & Supp. 2004). Petitioners' lands are situated within the area of the original Westlands Water District, which is now known as "Area I."

Westlands Contract until Westlands entered into a repayment contract that would recover the cost of the irrigation distribution works that the United States had constructed. See *Westlands Water District—Legal Questions*, Solicitor Opinion No. M-36901, 85 Interior Dec. 297 (1978). As a result of the Solicitor's decision, the United States refused to deliver water unless Westlands entered into interim contracts that provided for the payment of increased charges. The United States' position led to litigation brought by irrigators against Westlands, which prompted Westlands to attempt to join the United States as an indispensable party. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 491 F. Supp. 263, 264-265 (E.D. Cal. 1980).[6]

The Solicitor of the Interior ultimately rescinded the 1978 opinion. See *Westlands Water District*, Solicitor Opinion M-36901 (Supp. I) (June 17, 1986) (unpublished). In 1986, upon a stipulation among the parties, the United States District Court for the Eastern District of California entered a judgment (the 1986 Judgment) requiring the United States to provide water deliveries in accordance with the original Westlands Contract. AER 242-297. See *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir. 1995) (affirming district court's denial of a motion to enforce the 1986 Judgment), cert. denied, 516 U.S. 1028 (1995).

[6] Congress subsequently enacted the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263, which, among other things, granted Congress's consent "to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." § 221, 96 Stat. 1271 (codified at 43 U.S.C. 390uu). See pp. 20-25, *infra*.

C. The Current Dispute

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, 106 Stat. 4706, which amended the 1937 law that had reauthorized the CVP as a reclamation project. The CVPIA was enacted to achieve "a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f), 106 Stat. 4706. The CVPIA directs the Bureau of Reclamation, among other things, to reallocate more than one million acre-feet of water away from irrigation to environmental restoration purposes. CVPIA §§ 3406(b)(2) and (d)(1), 106 Stat. 4715-4716, 4722-4724.

In February 1993, the Bureau announced its initial allocation of CVP water for 1993. See Pet. App. 3a. Under the Bureau's allocation, water districts north of the Sacramento-San Joaquin Delta would receive 100% of their maximum contractual supplies of CVP water. Other water districts, south of the Delta, including Westlands, would receive only 50% of their maximum contractual supply of CVP water. See *ibid.* The Bureau imposed those limitations in light of the requirements of the CVPIA and the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, which directs the federal government to restrict actions that jeopardize endangered or threatened species.[7]

[7] The Bureau of Reclamation concluded, based on findings of the Department of the Interior's Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service, that pumps used to deliver water south of the Delta can harm winter-run chinook salmon and delta smelt, which are listed as threatened species under the ESA. See 58 Fed. Reg. 12,854 (1993)

In May 1993, Westlands filed an action challenging the Bureau's delivery reductions. See Pet. App. 3a-4a, 25a; Westlands Excerpts of Record (WER) 1-18. Westlands' complaint alleged that the defendants had violated the Due Process and Just Compensation Clauses of the United States Constitution, U.S. Const. Amend. V; the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; and the ESA. See WER 10-15. Westlands requested injunctive relief and money damages. See WER 16. Westlands, joined by three other water districts, later filed an amended complaint (the first amended complaint). The first amended amended complaint set forth claims that were virtually identical to those alleged in Westlands' original complaint. See J.A. 1 (Docket Entry 16).

A number of other individuals and entities, including petitioners, subsequently intervened. As a result of intervention, the plaintiffs consisted essentially of two groups: (1) water districts, water agencies, and irrigation districts; and (2) petitioners, who are landowners and water users who purchase water from Westlands. The defendants consisted of the United States, federal agencies, and a variety of intervening fishing and wildlife-protection groups. See Pet. App. 4a, 25a. Over time—and largely as a result of various negotiations and agreements among the State of California, the federal government, and urban, agricultural, and environmental interests—many of the concerns that had led the water districts and irrigation districts to file suit

(delta smelt); 55 Fed. Reg. 46,515 (1990) (chinook salmon). The Bureau imposed operating restrictions on the pumps to reduce losses to those species, which in turn reduced the amount of water that the Bureau could deliver south of the Delta. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717, 720-721, 724 n.13 (E.D. Cal. 1993).

were resolved. Accordingly, in September 1995, the districts dismissed their complaint, leaving only the claims of the water users, who are the petitioners before this Court. See *ibid.*

Petitioners pressed forward with numerous claims, including the cause of action at issue here, which alleges that the United States is liable to petitioners in money damages for an alleged breach of the Westlands Contract. See WER 40-41. Petitioners predicated that claim on 43 U.S.C. 390uu, which grants Congress's consent "to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." See Pet. App. 4a-5a, 26a, 47a; see also note 6, *supra*; Add., *infra*, 3a. Petitioners contended that Section 390uu not only waives the United States' sovereign immunity from joinder by Westlands as a necessary party defendant in a suit involving the Westlands Contract, but also subjects the United States to an individual farmer's independent suit directly against the United States seeking money damages for violation of the Westlands Contract. See Pet. App. 4a-5a, 26a; WER 34.

The district court denied the parties' cross-motions for summary judgment. Each of the parties then sought reconsideration. The federal government contended, among other things, that Section 390uu's waiver of sovereign immunity does not allow petitioners to sue under the Westlands Contract because petitioners are not intended third-party beneficiaries of that contract. On reconsideration, the district court agreed, holding that petitioners are not intended third-party beneficiaries because the Westlands Contract does not manifest an intention that petitioners would

have the right to enforce the contract against the United States. Pet. App. 27a-34a. The district court also ultimately ruled in favor of the United States on the merits of all of petitioners' claims and entered final judgment against petitioners. *Id.* at 21a-22a.

The court of appeals affirmed in part and vacated in part. Pet. App. 1a-20a. Although petitioners raised and the court addressed numerous issues, only one is relevant here. The court of appeals agreed with the district court that petitioners are not intended third-party beneficiaries of the Westlands Contract who may seek enforcement of the contract against the United States. *Id.* at 5a-17a. The court relied on its prior decision in *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000), which recognized that:

> Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.

Pet. App. 10a (quoting *Klamath*, 204 F.3d at 1211). The court of appeals reviewed the various provisions of the Westlands Contract, as well as petitioners' other claimed indicia of third-party beneficiary status. *Id.* at 10a-17a. The court concluded that petitioners had failed to show that the United States and Westlands manifested any intention that petitioners would be entitled to enforce the Westlands Contract and that sovereign immunity therefore barred petitioners' suit. *Id.* at 17a. The court of appeals accordingly vacated the district court judgment to the extent that it addressed the merits of petitioners' claims. *Id.* at 17a-20a.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that petitioners cannot sue the United States for an alleged breach of the Westlands Contract because petitioners are not intended third-party beneficiaries of that contract.

A. Petitioners' contention that they are intended beneficiaries is flawed at the outset because Congress has neither authorized the Secretary of the Interior to grant petitioners rights to enforce the Westlands Contract nor empowered the courts to adjudicate such enforcement claims. At the time of the Westlands Contract, Congress had specifically directed that the Secretary could contract only with irrigation districts and not individual farmers. Congress's decision to limit contracting to irrigation districts indicates that Congress did not intend for the Secretary to enter into contracts that would nevertheless give the farmers third-party enforcement rights. Furthermore, Congress has never waived the United States' sovereign immunity from third-party suits. The sovereign immunity waiver on which petitioners rely, 43 U.S.C. 390uu, allows only the joinder of the United States for declaratory relief at the request of a contracting party, which, in the case of the Westlands Contract, would be limited to an irrigation district. It does not allow suits by individual water users directly against the United States and does not, in any event, allow suits for damages.

B. Petitioners' claim that they are intended third-party beneficiaries is also inconsistent with the Westlands Contract, which does not grant individual water users the right to sue the United States for breach of that contract. Under familiar principles of contract law, a third party cannot enforce a contract unless the contracting parties express their intention to confer

that right. That rule is rigorously followed in the case of government contracts, and it has particular force in the case of a contract between the United States and a state governmental entity. As the court of appeals correctly recognized and petitioners readily concede, the Westlands Contract contains many detailed terms, but it makes no mention whatsoever that individual water users would be entitled to enforce the contract.

C. Petitioners ultimately argue that they should be entitled to enforce the Westlands Contract because either the Westlands Contract or other extra-contractual sources impliedly grant them that right. But even if a private third-party right to enforce a contract between two governmental entities could arise by implication in another context, no such implication would be warranted here. Contrary to petitioners' contentions, none of the provisions of the Westlands Contract implies that petitioners would have a right to sue the United States to enforce the contract. Those provisions recognize, at most, that the water users are incidental beneficiaries. Petitioners are also wrong in suggesting that the "surrounding circumstances" create such an implication. Finally, there is no merit to petitioners' contention that a prior stipulated judgment dealing with different issues could give petitioners a right to sue the United States for breach of the Westlands Contract or preclude the United States from challenging petitioners' unwarranted claim of third-party enforcement rights.

ARGUMENT

PETITIONERS CANNOT SUE THE UNITED STATES FOR AN ALLEGED BREACH OF THE WESTLANDS CONTRACT BECAUSE PETITIONERS ARE NOT INTENDED THIRD-PARTY BENEFICIARIES OF THAT CONTRACT

Petitioners' assertion of a right to seek enforcement of the Westlands Contract fails on three related bases. First, Congress did not authorize the United States to enter into reclamation contracts with Westlands that would grant petitioners the right to enforce the contract as third-party beneficiaries, nor does 43 U.S.C. 390uu provide a corresponding waiver of sovereign immunity that would allow the courts to adjudicate such suits. Second, the Westlands Contract makes no mention of granting petitioners a right to sue the United States for breach of that contract. And third, even if such a right could arise by implication, the Westlands Contract, both on its own terms and when considered in its surrounding circumstances, does not impliedly grant petitioners a right to sue the United States for breach of the contract.

A. Congress Has Neither Authorized The Secretary Of The Interior To Grant Petitioners Third-Party Rights To Enforce The Westlands Contract Nor Empowered The Courts To Enforce Such Rights

Petitioners' theory that it may enforce asserted third-party beneficiary rights against the United States is flawed at the threshold, because Congress has neither authorized the Secretary of the Interior to create such rights in the Westlands Contract nor empowered the courts to adjudicate those supposed rights.

1. *Congress authorized the Secretary of the Interior to contract only with the irrigation districts*

Executive officers may enter into contracts only insofar as Congress has authorized those officers to create binding obligations on the national government and its Treasury. See U.S. Const. Art. I, § 9, Cl. 7; 31 U.S.C. 1341 (Anti-Deficiency Act). As this Court has explained, "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 425 (1990). That limitation is necessary "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 428.

In the case of the CVP, Congress has authorized the Secretary of the Interior to enter into contacts in which the United States agrees to provide for the delivery of irrigation water in exchange for money payments to recover the costs of providing the water. Congress has specified, in pellucid terms, that the Secretary may enter into contracts only with *irrigation districts*:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made *with an irrigation district or irrigation districts organized under State law* providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid with such terms of years as the Secretary may find necessary.

43 U.S.C. 423e (emphasis added). Section 423e expressly limits the Secretary's authority to creating enforceable legal obligations between the United States and irrigation districts. It puts to an end the Secretary's earlier practice of creating such obligations between the United States and individual farmers. Section 423e provides, in its place, centralized contracting strictly between the United States and irrigation districts, which facilitates the formulation, enforcement, and modification of such agreements and the resolution of disputes arising under them. See pp. 4-5, *supra*.

Petitioners' theory that they are entitled to enforce the Westlands Contract is inconsistent with Congress's objective in requiring the Secretary to contract with irrigation districts. Congress originally provided that the United States would deliver reclamation project water by contract with individual water users. In return, the United States placed a lien on the individual's land. See page 4, *supra*. Under that system, the individual water user had a right to enforce the contract and a reciprocal obligation, secured by the lien, to pay the United States for the water. Under the current system, the United States enters into contracts with irrigation districts, formed pursuant to state law, that are responsible for repayment, thereby relieving individual owners of the direct repayment obligation and accompanying lien. Under petitioners' theory, they are entitled to an amalgam of both systems that grants them the benefits of the old system without the attendant obligations. They seek a right to enforce a contract between the United States and Westlands without the accompanying obligation, secured by a lien on

their property, to pay the United States directly for what they receive.

There is no basis in Section 423e to conclude that Congress intended to negate the effect of the move away from contracts with individual farmers by authorizing the Secretary to enter into contracts with irrigation districts that would in turn create enforceable rights in the same farmers to whom the irrigation districts would distribute the water. Although Section 423e describes in detail specific aspects of the Secretary's contracting authority, it makes no mention of any contracts with individual irrigators or the creation of third-party rights to enforce contractual obligations. See 43 U.S.C. 423e. See *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (courts should not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other") (internal quotation marks omitted).

When Congress enacted Section 423e in 1926, it acted in accordance with "the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it." *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912). It also acted in accordance with the familiar principle that government contracts do not impart third party rights unless they expressly so provide. See *id.* at 231. That principle should apply with particular force in a context in which Congress discards a policy of contracting with individual farmers in favor of contracts with irrigation districts. If Congress had intended to authorize "an exception to the general principle" that would grant third parties the "exceptional privilege" of suing on a contract between the United States and another governmental entity, *id.* at 230, at the same time that it discontinued its practice of direct contracts with individual farmers, it would have made that intention express. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

2. *Congress waived the United States' immunity from suit only for claims brought by the irrigation districts against the United States*

This Court has repeatedly recognized that the United States, as sovereign, cannot be sued in the absence of a waiver of sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999). A congressional waiver of sovereign immunity must "be 'unequivocally expressed' in the statutory text" and "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* at 261 (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)). Those principles are longstanding. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 586-589 (1941); *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). Hence, if Congress had intended to authorize third-party beneficiary suits at the time of its enactment of Section 423(e), it would have provided a corresponding express waiver of the United States' sovereign immunity from such suits. Congress's failure to do so indicates that Congress did not authorize either the creation of third-party beneficiary rights or their enforcement against the United States.

Petitioners contend (Pet. Br. 11-12) that Congress provided them with a waiver of sovereign immunity for their third-party enforcement action through a pro-

vision of the Reclamation Reform Act of 1982 that, in pertinent part, provides:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law.

43 U.S.C. 390uu. Petitioners' reliance on that provision, which makes no mention whatsoever of third-party beneficiary suits but only the "rights of a contracting entity," is misplaced for three reasons.

First, Congress enacted Section 390uu in 1982, more than 50 years after Congress authorized the Secretary to contract with irrigation districts and nearly 20 years after the Secretary entered into the contract with Westlands. See Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, § 221, 96 Stat. 1271. If Congress had intended that the Secretary's contracts with irrigation districts would create enforceable rights in third parties, Congress would not have waited until that late date to provide a waiver of sovereign immunity. Cf. *Trient Partners I Ltd.* v. *Blockbuster Entm't Corp.*, 83 F.3d 704, 713 (5th Cir. 1996) ("A third party beneficiary contract is only created if (1) the intent of the parties to the contract is clear that the promisor is assuming a direct obligation to the beneficiary; and (2) such intent is evidenced at the time that the contract is formed.").

Second, Section 390uu's express terms establish that this provision has nothing to do with allowing individual farmers to bring a third-party enforcement action against the United States. Congress gave consent to "*join*" the United States as a "*necessary defendant*" in a pre-existing action in order to allow the determination

of "the contractual rights of a *contracting entity* and the United States." 43 U.S.C. 390uu. See *Wyoming* v. *United States*, 933 F. Supp. 1030, 1039 (D. Wyo. 1996) (Section 390uu "speaks only of 'contracting entities,' i.e., parties to a contract with the United States"); Fed. R. Civ. P. 19(a). The scope of Section 390uu's waiver must, of course, be strictly limited to what Congress "unequivocally expressed." *Blue Fox*, 525 U.S. at 261; *Lane*, 518 U.S. at 192.[8]

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[8] Petitioners' attempt (Pet. Br. 12 n.24) to expand the scope of Section 390uu by reference to its legislative history is without merit. "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192. In any event, the legislative history of Section 390uu does not support petitioners' construction. Although the Senate committee report referred to suits concerning the contractual rights of "parties or beneficiaries" of reclamation contracts, Congress adopted the House of Representatives' version of Section 390uu, which did not include the Senate version's reference to beneficiaries. Compare H.R. Rep. No. 458, 97th Cong., 2d Sess. 6 (1982) (bill allowing suits "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States"), with S. Rep. No. 373, 97th Cong., 2d Sess. 5 (1982) (bill allowing suits "to adjudicate, confirm, validate, or decree the contractual right of any person or entity, including but not limited to any contracting entity, who is the beneficiary of any such [reclamation] contract"); see H.R. Conf. Rep. No. 855, 97th Cong., 2d Sess. 33 (1982) (noting that the Conference Committee adopted the House version). Moreover, although Representative Kazen did refer to the desire to "give the irrigation districts and their members access to the courts," that may have been a reflection of the fact that the provision would often be invoked by an irrigation district that had been sued by individual farmers. In any event, he described the provision that would become Section 390uu as "simply a matter of making certain that the districts, or individuals who have a contract, may have their day in court." 128 Cong. Rec. 8816 (1982).

Where, as here, the United States contracts with an irrigation district for the delivery of reclamation project water, Section 390uu's precisely phrased terms grant Congress's consent for an irrigation district to join the United States as a defendant in an ongoing suit between the irrigation district and its members. This, of course, was the precise situation presented in *Barcellos*, *supra*, where individual farmers sued Westlands, and Westlands then sought to bring a claim against the United States. See 491 F. Supp. at 265. Congress did not give its consent for a third party to bring a claim directly against the United States. To the contrary, Section 390uu clearly expresses Congress's understanding that individual farmers who were unhappy with their water allocations would sue the irrigation district, and the irrigation district would then have the option of joining the United States to resolve any dispute between the irrigation district and the United States over *their* contractual rights.

Third, Section 390uu would not, under any circumstances, allow petitioners' suit seeking money damages from the United States. As this Court has stated, "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM* v. *Richmond*, 496 U.S. at 416. "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. Accord *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Section 390uu, which authorizes courts only "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States," does not waive the United States' immunity from *monetary* claims, even as to disputes between the irrigation district and the United States. Although the

lower courts have not necessarily paid close heed to Section 390uu's carefully circumscribed language in all respects, they have correctly recognized that Section 390uu does not authorize courts to award money damages. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 674 (9th Cir. 1993) ("We conclude that this statutory provision waives sovereign immunity in this case, where appellants are seeking injunctive and declaratory relief under [reclamation] contracts."); *Wyoming*, 933 F. Supp. at 1038 ("This statute waives the United States' sovereign immunity from a declaratory relief action brought by a party to a contract with the United States to establish the party's rights under that contract.").

Section 390uu provides an irrigation district that has been sued by individual farmers an opportunity to have its rights against the United States declared. The irrigation district thus has an opportunity to sue the United States in contract subject to the jurisdictional rules of the Tucker Act, most often in the court of federal claims. Section 390uu's structure, thus, reinforces petitioners' inability to sue the United States. It assumes that the individual farmer's remedy will lie in a suit against the irrigation district in a federal or state court, and it attempts to ameliorate any unfairness to the irrigation district from inconsistent judgments by allowing a declaration of its rights against the United States, which could then be enforced in the court of federal claims. Petitioners' construction of Section 390uu would result in a dramatic departure from the normal provisions for suing the government for claims

arising out of a contract by allowing a suit for money damages in a district court.[9]

B. The Westlands Contract, By Its Terms, Does Not Grant Petitioners A Right To Sue The United States For Breach Of That Contract

Even if Congress had authorized the Secretary of the Interior to grant water users third-party rights to enforce a contract with an irrigation district and had empowered the courts in this case to enforce such rights, petitioners' action would fail because the Westlands Contract does not grant petitioners the right to enforce the contract. The terms of the Westlands Contract manifest no intention on the part of the contracting parties to confer enforceable rights on individual water users under the contract, and the statutory scheme—even if it were construed not to foreclose the conferral of such rights—at the very least strongly supports the conclusion that the contract should not be construed to do so.

1. *A third party cannot enforce a contract unless the contracting parties express their intention to confer that right*

Petitioners claim that they are third-party beneficiaries based on their construction of the Westlands

[9] Petitioners did not seek to bring a suit against the United States for money damages under the "little" Tucker Act, 28 U.S.C. 1346 (granting district courts jurisdiction over claims against the United States not exceeding $ 10,000) or the Tucker Act, 28 U.S.C. 1491 (granting the Court of Federal Claims jurisdiction over claims against the United States without regard to the amount). See, *e.g.*, *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (addressing a third-party beneficiary claim under the Tucker Act).

Contract, which is a contract solely between the United States and Westlands under the federal reclamation laws. See J.A. 30. Petitioners' claimed rights accordingly are governed by federal law. See *United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970). The Court may rely on traditional rules of contract law to guide its determination of federal law, as long as those rules are consistent with federal policies. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957).[10]

Under traditional contract law principles, petitioners can have no right to enforce a contract between two government entities—the United States and a state water district—unless the contracting parties manifested an intention to grant petitioners enforcement rights. See, *e.g.*, Restatement (Second) of Contracts § 438 (introductory note) (1981)("the power of promisor and promisee to create rights in a beneficiary" depends on their "manifesting an intention to do so"). That requirement is rigorously enforced in the case of government contracts. "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Id.* § 313 cmt. a. See, *e.g.*, *German Alliance Ins. Co.*, 226 U.S. at 230-231. That limitation is particularly compelling when the promisor is the United States, which is normally entitled to sovereign immunity, and the promisee is a state govern-

[10] Congress's decision to allow the Secretary to contract only with irrigation districts, 43 U.S.C. 423e, and to waive the United States' sovereign immunity only with respect to irrigation districts in prescribed circumstances, reflects an important legislative policy judgment that bears on the question of the parties' intent with respect to recognizing rights in third parties under the contract. See note 12, *infra*.

mental entity organized "for the benefit of the inhabitants collectively." *Id.* at 231.[11]

Petitioners suggest that they should qualify as third-party beneficiaries because they receive what they characterize as a "direct" benefit from the contract. As a threshold matter, petitioners' characterization is unsound. The Westlands Contract specifies rights and obligations that run strictly between the United States and Westlands. The Bureau delivers water to Westlands, and Westlands pays for it. Petitioners benefit from the contract only because Westlands in turn distributes the water to petitioners based on the separate legal relationship between Westlands and those water users. Petitioners do not, in the relevant sense, receive a "direct" benefit from the Westlands Contract. See *German Alliance Ins. Co.*, 226 U.S. at 231 (taxpayers receive only "indirect" benefits from municipal services).

The Westlands Contract does not dictate how Westlands allocates the water that it delivers to individual water users; rather, the distribution is determined through their association with Westlands. See Cal. Water Code Ann. § 35420 (West 1984). Petitioners benefit directly from their relationship with Westlands, but only indirectly from the Bureau's delivery of water to Westlands under Westlands Contract. See 9 Arthur

[11] There is no question that state irrigation districts are governmental entities. See *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 721 (1973) (characterizing a California water storage district as a "particular type of local governmental unit"); *id.* at 723 (characterizing an irrigation district as a "local governmental unit"); see also *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896). California law regards irrigation districts as "instrumentalities of local government." *Turlock Irrigation Dist.* v. *Hetrick*, 81 Cal. Rptr. 2d 175, 177 (1999).

L. Corbin, *Corbin on Contracts* § 779D, at 39 (Interim ed. 2002) ("[W]here A is under a contractual duty to C the performance of which requires labor or materials, and B promises A to supply to him such labor or materials; C has no action against B on this promise."). The very nature of the statutory and contractual framework—expressly contemplating one relationship between the United States and the district on the one hand and a *separate* state-law contractual and statutory relationship between the district and the water users on the other—cuts strongly against concluding that individual water users *also* have rights (albeit implied) under the contract between the United States and the district.

Even if petitioners were deemed to receive a "direct benefit" in some sense from the Westlands Contract, such a benefit would not, by itself, qualify them as intended beneficiaries entitled to enforce the contract. See *German Alliance Ins. Co.*, 226 U.S. at 230 ("Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, *at least* show that it was intended for his direct benefit." (emphasis added)). Petitioners must additionally show that granting enforcement rights to third parties "is in accordance with the particular intent of those who made this agreement." *Id.* at 231-232. See Restatement (Second) of Contracts, *supra*, §§ 302, 304, 313.[12]

[12] Section 302 of the Restatement explains, with relevance to the situation here, that a beneficiary of a promise qualifies as an intended beneficiary only "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." In the case of government contracts, the extension of third-party

Courts distinguish "intended" third-party beneficiaries—who can sue under the contract—from "incidental" third-party beneficiaries—who cannot—by determining whether the contracting parties intended to confer enforcement rights on the third party. Restatement (Second) of Contracts, *supra*, §§ 302, 304. The Restatement reflects the prevailing view that it is not enough that the contracting parties envisioned that a third party would receive a benefit. Rather, as a leading commentator has explained, "the courts have generally construed the prerequisite of an 'intent to benefit' to mean an intent to confer on a third party an enforceable right concerning which the promisee and the promisor bargained." 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 37:8, at 79 (4th ed. 2000).[13]

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rights would additionally be inappropriate if it "would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." Restatement (Second) Contracts, *supra*, § 313(1). See pp. 17-25, *supra* (discussing the policies of the federal reclamation laws in authorizing contracts and providing remedies). Accordingly, the promisor is generally not liable to third parties unless "the terms of the promise provide for such liability." Restatement (Second) Contracts, *supra*, § 313(2)(a).

[13] Although the Restatement and Williston embrace the prevailing view, another leading commentator has questioned that approach on the ground that, "[i]n the making of contracts parties do not often consciously advert to the legal relations that will be created by their expressions." See 9 Arthur L. Corbin, *supra*, § 777, at 21-24. Corbin instead has suggested looking for "an intent on the part of the promisee that the performance beneficial to the third party shall be rendered by the promisor." *Id.* at 22. But the example he offered to support that position was a case in which the promisor rendered performance under the contract directly to the third party, and an intent to give the third party the right to enforce the contract could be inferred from the manner in which

Federal and state courts have generally had little difficulty in applying the Restatement's sensible distinction, which emphasizes the primacy of the parties' objectively manifested intent in ascertaining a third party's rights under the contract. For example, the Fifth Circuit stated, in the context of a contract between private parties:

> A third party beneficiary contract is only created if (1) the intent of the parties to the contract is clear that the promisor is assuming a direct obligation to the beneficiary; and (2) such intent is evidenced at the time that the contract is formed.

Trient Partners I Ltd., 83 F.3d at 713. Similarly, the Connecticut Supreme Court stated that "the ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the [mutual] intent of the parties to the contract was

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the third party benefitted from the contract. *Id.* at 22 n.37 (citing *Lenz* v. *Chicago & N.W. Ry.*, 86 N.W. 607 (Wis. 1901)).

As explained in the text, see pp. 27-28, *supra*, Corbin finds no third-party beneficiary rights in the distinct situation where there is no such direct performance—where C (here, an irrigation district) is under a contractual obligation to A (a farmer) and C enters into a *separate contract* with B (the United States) to supply a commodity (water) to enable it to perform its obligation to A. Moreover, other commentators have noted that Professor Corbin's formulation does not adequately distinguish between contracts intended to give a third party the right to sue and contracts intended only to confer an indirect benefit. See Melvin A. Eisenberg, *Third-Party Benefciaries*, 92 Colum. L. Rev. 1358, 1381 (1992) ("the intent-to-benefit test * * * is difficult or impossible to apply in a meaningful and consistent way and * * * is essentially an empty test that asks a non-question"); Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63, 70 (1989) ("Corbin's work overlooks the complications inherent in third party beneficiary contracts").

that the promisor should assume a direct obligation to the third party [beneficiary]." *Grigerik* v. *Sharpe*, 721 A.2d 526, 536 (Conn. 1998) (alteration in original, emphasis omitted, internal quotation marks omitted), cert. denied, 747 A.2d 2 (Conn. 2000).[11]

2. *Petitioners concede that the Westlands Contract does not grant them an express right to sue the United States*

Petitioners acknowledge that nothing in the Westlands Contract grants them an express right to sue to enforce the contract between Westlands and the United States. They argue only that third party beneficiary status is "implied in the language of the contract and the surrounding circumstances." See Pet. Br. 22 (capitalization altered); see also *id.* at 27, 36. That con-

[11] See *National Bd. of Examiners for Osteopathic Physicians & Surgeons, Inc.* v. *American Osteopathic Ass'n*, 645 N.E.2d 608, 618 (Ind. Ct. App. 1994) ("The intent necessary to the third-party's right to sue is not a desire or purpose to confer a particular benefit upon the third-party nor a desire to advance his interest or promote his welfare, but an intent that the promising party or parties shall assume a direct obligation to him."); *Laclede Inv. Corp.* v. *Kaiser*, 596 S.W.2d 36, 42 (Mo. Ct. App. 1980) ("The contract terms must clearly express that the contracting parties intended the third party to be the beneficiary of performance of the contract and have the right to maintain an action on the contract."); see also 17A Am. Jur. 2d *Contracts* § 432 (2001) ("the intent which must exist is not a desire or purpose to confer a particular benefit upon the third person, but an intent that the promisor should assume a direct obligation to him"); Comment Note, *Right of Third Person to Enforce Contract Between Others for His Benefit* 81 A.L.R. 1271, 1287 (1932) ('intent' is not a desire or purpose to confer a benefit upon the third person, nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him"); *Vikingstad* v. *Baggott*, 282 P.2d 824, 826 (Wash. 1955) (quoting 81 A.L.R. at 1287).

cession is significant because this Court has recognized, even in the context of private contracts, that the contracting parties' chosen language provides the best indication of the parties' intent to create third-party rights. See *United Steelworkers* v. *Rawson*, 495 U.S. 362, 375-376 (1990) ("If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.").

A fortiori, a contract between two governmental entities—in this case, the United States and a state water district—should not be construed to authorize private third parties to enforce the contract against the United States unless "the terms of the promise provide for such liability." Restatement (Second) Contracts, *supra*, § 313(2)(a). See *ibid.*, comment a ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."). To hold otherwise would subject the United States to liability without any determination and expression, by Congress or the Executive Branch, of that intent. Furthermore, it would frustrate the irrigation district's core function of formulating and executing contracts as a single agency on behalf of the collective interest of the water users within its geographic boundaries.

In similar contexts, this Court has refused to recognize statutory private rights of action, whether against the government or other private parties, in the absence of an express legislative directive. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002); *Correctional Servs. Corp.* v.

Malesko, 534 U.S. 61 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979). And it has been especially reluctant to do so when the statute contemplates a contractual funding relationship between the United States and another entity and the plaintiff essentially sues as a third party beneficiary under that contract. *Gonzaga Univ.*, 536 U.S. at 279-282. The Court should thus be especially reluctant to recognize third-party contractual rights in the absence of express provision of such rights in the authorizing statute or within the four corners of the contract. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). There is every reason to expect that, if the contracting parties intended to create such rights, which would subject the United States to monetary liability even where the irrigation district has disavowed such a claim, and would undermine the irrigation district's authority to resolve or compromise contractual disputes on behalf of its constituents, the contracting parties would say so expressly. See Pet. App. 10a ("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*." (quoting *Klamath*, 204 F.3d at 1211) (emphasis added and internal citations omitted in original)). That is particularly true in light of Congress's decision to move away from its prior practice of contracting directly with individual farmers.

Petitioners suggest otherwise, relying primarily on the Federal Circuit's decision in *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571 (1984), cert. denied, 474

U.S. 818 (1985). See Pet. Br. 25-27, 37, 40, 41, 44, 46. They contend that the *Allen Orchards* decision shows that any irrigator is an intended third-party beneficiary of its irrigation district's reclamation contracts with the United States. But, contrary to petitioners' suggestion, *Allen Orchards* did not categorically hold that all irrigators using water from a reclamation project are intended third-party beneficiaries of a reclamation contract between the United States and the irrigation district. In fact, *Allen Orchards* did not involve a reclamation contract at all. Instead, the irrigators in that case claimed to be intended third-party beneficiaries of a "consent decree and subsequent alleged implied contracts." 749 F.2d at 1576.

Moreover, to the extent that *Allen Orchards* suggests that individual farmers should be viewed as intended third-party beneficiaries of reclamation contracts, the Ninth Circuit properly concluded that *Allen Orchards* is incorrect as a matter of contract law precisely because it fails to take account of the actual terms of the contract. Pet. App. 14a n.5. "That court did not * * * examine any contract language. Instead, it based its conclusion on the fact that the farmers were beneficial users of the water who ultimately paid for it." *Ibid.* The Ninth Circuit correctly concluded that "the mere fact that the farmers benefit from the [Westlands Contract] is not enough to confer intended-beneficiary status on them." *Ibid.* See pp. 29-31, *supra*.[15]

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[15] The Federal Circuit's decision is doubtful precedent in any event, because that court predicated its decision on the mistaken assumption that the irrigators in *Allen Orchards* held a property right under Washington state law to the water they put to beneficial use. 749 F.2d at 1576 (citing *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir. 1943)). The Washington Supreme Court has since held that, under Washington law, recipients of federal reclamation water do

In sum, there is no warrant for creating contractual rights without regard to the express terms of the contract and in disregard of the statutory scheme authorizing the contract. Where, as here, a reclamation contract between two governmental entities makes no provision for third-party enforcement, the contract should not be construed to create third-party enforcement rights.

C. Neither The Westlands Contract Nor Any Extra-Contractual Source Impliedly Grants Petitioners The Right To Sue The United States For Breach Of The Westlands Contract

Even if this Court were to conclude that a reclamation contract between the United States and a state irrigation district could create "implied" third-party enforcement rights in some circumstances, no such implication is warranted here. Petitioners cite various provisions of the Westlands Contract (Pet. Br. 28-36), but those provisions indicate, at most, that the United States and Westlands understood that Westlands would in turn provide water to farmers. They do not

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not have an appropriative right to the water they use. See *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 281 (Wash. 1992). The California courts have reached the same conclusion with respect to California irrigators. See pp. 41-43, *infra*. Petitioners' reliance on *Henderson County Drainage District No. 3* v. *United States*, 53 Fed. Cl. 48 (2002), is similarly misplaced. See Pet. Br. 25, 27, 43-44. *Henderson* did not involve the Bureau of Reclamation, an irrigation district, federal reclamation law, or the delivery of water. The court in that case, without any consideration of the contract language, held that a drainage district could sue under a contract the district had negotiated with the Army Corps of Engineers because "the landowners would reasonably expect to be helped (or injured) by the [contract]." 53 Fed. Cl. at 52.

establish that the farmers would have the right to enforce the Westlands Contract against the United States. There is also no merit to petitioners' contentions that the "surrounding circumstances" of the Westlands Contract (*id.* at 36-46) and a prior stipulated judgment respecting that contract (*id.* at 46-49) provide a basis for recognizing third-party enforcement rights.

1. Article 15 of the Westlands Contract does not grant petitioners an implied right to sue the United States

Petitioners contend that Article 15 of the Westlands Contract "recognize[s] farmers' rights to use the water, strongly imply[ing] that the parties to the contract intended that performance would benefit the farmers." Pet. Br. 29. The implication that petitioners seek to draw from Article 15—that it confers enforceable rights against the United States—is unsound. Article 15 does not state that petitioners or other irrigators have a right under the Westlands Contract enforceable against the United States.[16] Rather, Article 15, captioned "ALL BENEFITS CONDITIONED UPON PAYMENT" (J.A. 45), simply recognizes that situations may arise in which Westlands is unable to collect payment from water users and may therefore be unable to meet

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[16] The relevant portion of Article 15 states (J.A. 45):

> [N]o water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract.

its contractual obligations to the United States. Article 15 makes clear that, in those situations, the water users must pay for the water as "a prerequisite to the right to the use of water furnished to the District" and that there is "no right to any water" for which payment is not made. *Ibid.*

Article 15 does not confer federal rights on water users. To the contrary, Article 15 protects the United States' interests by making clear that the United States is under no obligation to provide water to Westlands if Westlands has not received the money it needs to pay for the water. It does so by restricting *Westlands* from providing CVP water to the ultimate water users under its relationship with those water users unless the water users pay their assessments for that water. Thus, to the extent that Article 15 says anything about the water users' contractual rights, it indicates that those rights derive from the water users' relationship and state-law contracts with *Westlands*, not from Westlands' contract with the United States, and that Article 15 places federal *restrictions* on any such contracts. See J.A. 45 (the United States need not provide water for which payment is not made "notwithstanding the existence of any contract between the District and the owners or owners [of land in the District]"); *ibid.* ("Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract.").[17]

[17] Article 14, captioned "AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT—TAXABLE LAND" (J.A. 45), reinforces that understanding. It states that "[t]he District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users." *Ibid.*

2. The other Westlands Contract provisions that petitioners cite do not grant petitioners an implied right to sue the United States

Petitioners contend that Articles 9(c), 11(b), and 11(c) collectively "recognize third persons have rights or remedies through or under the District" and "strongly imply" that petitioners are such third parties. Pet. Br. 31. The language of those provisions, however, does not support petitioners' characterization.

Article 9(c) provides, in relevant part, that the United States shall have the right to use "waste, seepage, and return-flow water" that derives from the United States' deliveries to Westlands and escapes or leaves Westlands' boundaries, but disclaims the United States' right to "water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District." J.A. 41. Article 11(b) provides that "there shall be made an adjustment on account of the amounts paid to the United States by the District for water for [a shortage] year" and that this adjustment "shall constitute the sol[e] remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein." J.A. 43. Article 11(c) allows Westlands to choose not to accept or pay for water exceeding 300 parts per million of chloride, but requires Westlands to pay for "any water actually furnished to and used by, through, or under the District for any purpose." J.A. 44.

Together, Articles 9(c), 11(b) and 11(c) show that the contracting parties understood that Westlands itself would not necessarily use the water that the United States delivers under the Westlands Contract. Those provisions neither say nor imply, however, that the ultimate water users would have any right to enforce the Westlands Contract. Those provisions merely set out standard limitations on the contracting parties' duties. They do not promise a benefit to a third party and do not evidence, even implicitly, an intent to give water users such as petitioners the right to enforce the contract. To the contrary, Article 11(b) makes clear that the United States' only contractual obligation is to Westlands and that the only remedy for a water shortage is an adjustment of Westlands' account. That provision clearly excludes the type of suit petitioners are asserting in this case: a suit by a third party to seek money damages against the United States for a water shortage.[18]

[18] There is no merit to petitioners' contention that Articles 2(b), 5, and 12 "confirm" that they are intended third-party beneficiaries. See Pet. Br. 32. Those provisions merely show that the United States and Westlands understood that most of the water delivered under the contract would be used to irrigate lands within Westlands' boundaries. They do not indicate that the water users would have the right to enforce the Westlands Contract. There is also no merit to petitioners' contentions (*id.* at 32-36) that the Westlands Contract's recitals—which state that the contract is made "in pursuance generally" of the federal reclamation laws (J.A. 30) and that Westlands acts "pursuant to" California law (*ibid.*)—give petitioners a right to enforce the Westlands Contract against the United States. Those standard recitals say nothing about third-party enforcement rights.

3. *The "surrounding circumstances" of the Westlands Contract do not imply that petitioners are entitled to sue the United States for breach of that contract*

Petitioners argue (Pet. Br. 36-46) that the "surrounding circumstances" of the Westlands Contact also provide a basis for inferring third-party enforcement rights. But the most immediate surrounding circumstance—the federal statutory framework that requires a contract with an irrigation district and eschews contracts with individual water users—strongly reinforces the conclusion, evident from the terms of the contract itself, that petitioners, as water users, have no individually enforceable contract rights against the United States.

Petitioners contend that they should have third-party enforcement rights because they "use," "pay" for, and "own" the water that the United States delivers to Westlands under the Westlands Contract. *Id.* at 37-43. The farmers (including petitioners) who use and pay for water delivered to Westlands pursuant to its contract with the United States do so pursuant to their own relationship with Westlands established by state law, subject to whatever limitations on that relationship federal law and the Westlands Contract may impose on that relationship. The Westlands Contract does not, for example, identify the particular persons who will use water under the contract, and it does not provide for the water users to receive water directly from the United States or for the water users to make payments directly to the United States. The fact that petitioners and other farmers use and pay for the water therefore does not suggest that the United States and Westlands intended to confer on them individual rights to enforce the Westlands Contract.

Petitioners' claim that they own the water or rights to the water used on their lands is equally unavailing in establishing that they are third-party beneficiaries under the Westlands Contract. Whatever the significance of concepts of equitable and legal title, ownership, and similar property or quasi-property rights in other settings—e.g., where a water user sues to enforce what he alleges to be *property* rights in water, see, e.g., *Ickes* v. *Fox*, 300 U.S. 82 (1937), they have no bearing on the question of *contract* law at issue here. As explained above, insofar as *contract* rights are concerned, the reclamation laws provide for the United States to contract only with irrigation districts, rejecting a prior regime in which the United States entered into contractual arrangements directly with water users, and the particular contract at issue here with the Westlands District manifests no intent to depart from that framework by conferring privately enforceable contract rights on individual water users.

Moreover, insofar as claims of entitlement to project water are concerned, Congress has specified that the question of who holds the rights to water from a federal reclamation project is a matter of state law. See 43 U.S.C. 383; *California* v. *United States*, 438 U.S. 645, 665, 675 (1978). California has made clear that the United States, and not the individual water users who receive project water, holds the right to the CVP water that the Bureau delivers to Westlands.

The California Water Code provides that a party can acquire an appropriative water right only by obtaining a state water permit. Cal. Water Code Ann. § 1225 (West 1971). The Bureau of Reclamation, and not petitioners, holds the state permits for the water that the United States delivers to Westlands under the Westlands Contract. WER 232-233. Accordingly, California

courts and the California State Water Resources Control Board have determined that the Bureau, not the irrigation districts or the water users, hold the water rights to CVP water. *County of San Joaquin* v. *State Water Res. Control Bd.*, 63 Cal. Rptr. 2d 277, 285 n.12 (Ct. App. 1997) ("The Bureau has appropriative water rights in the Central Valley Project."); *Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, Revised Decision 1641, at 129 (Cal. St. Water Res. Control Bd. 2000) (the United States "is the water right holder") (available at (www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf). See *Israel* v. *Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (holding that end users of water delivered by a federal reclamation project do not acquire appropriative rights in the water that would transcend contractual terms).

Petitioners nevertheless contend (Br. 33, 37) that they must hold the rights to water they use to irrigate their lands, because federal reclamation law incorporates the state law concepts of appurtenancy and beneficial use. 43 U.S.C. 372 ("The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."). But, as the California State Water Resources Control Board has explained, the requirements of appurtenancy and beneficial use do not mean that the owner of the land to which the water use is appurtenant or the person who puts the water to beneficial use holds the water right. Revised Decision 1641, *supra*, at 128. Thus, one who appropriates water from its natural course and rents or sells it to others can acquire an appropriative water right. *See, e.g., Joerger* v. *Pacific Gas & Elec.*, 276 P. 1017, 1029 (Cal. 1929).

Petitioners erroneously invoke decisions of this Court for the proposition that they must have enforceable rights under the Westlands Contract because, they assert, they and other individual water users hold water rights under California law. See Pet. Br. 21, 25, 37-40, discussing *Ickes* v. *Fox*, *supra*; *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *California* v. *United States*, *supra*; and *Nevada* v. *United States*, 463 U.S. 110, 121-126 (1983). None of those cases involved contract claims against the United States or claims by water users to have enforceable contractual rights as third-party beneficiaries under a contract between the United States and an irrigation district. They accordingly do not support petitioners' position here.

Moreover, the California State Water Resources Control Board and California courts definitively interpret California water law, and they have determined that it is the United States that holds the rights to the water it delivers to Westlands under the Westlands Contract. None of the decisions of this Court on which petitioners rely interpreted California law. See *Nevada* v. *United States*, *supra* (Nevada law); *Nebraska* v. *Wyoming*, *supra* (Nebraska and Wyoming law); *Ickes* v. *Fox*, *supra* (Washington law). And *California* v. *United States*, *supra*, held that the United States must comply with California water law in operating the CVP, but said nothing about who holds water rights to CVP water under California law.[19]

[19] Petitioners' contention (Pet. Br. 43) that they are entitled to enforce the Westlands Contract because they "reasonably relied" on the contracting parties' supposed intent to benefit them is without merit because, for the reasons already stated, the Westlands Contract was not intended to provide direct benefits to petitioners and petitioners' reliance, reasonable or otherwise, is not sufficient to create third-party enforcement rights. See pp. 27-28, *supra*.

4. The 1986 Judgment does not give petitioners a right to sue the United States for breach of the Westlands Contract

Petitioners contend (Pet. Br. 46-48) that the 1986 Judgment, entered pursuant to stipulation in *Barcellos* (see pp. 8-9, *supra*), shows that they are intended beneficiaries of the Westlands' Contract. The 1986 Judgment was entered 23 years after the Westlands Contract and, therefore, is not probative of the United States' and Westlands' intent at the time they entered into the Westlands Contract. See, *e.g.*, *Trient Partners*, 83 F.3d at 713; *Corrugated Paper Products, Inc.* v. *Longview Fibre Co.*, 868 F.2d 908, 913 (7th Cir. 1989). In any event, even if the 1986 Judgment provided

Petitioners' further contention that Westlands is their "surrogate" (*id.* at 44) is incorrect. Westlands represents the water users collectively as a limited-purpose governmental entity, not as a surrogate for individual water users.

Even if petitioners were correct in comparing an irrigation district to a private fiduciary for each individual water user (*id.* at 45 n.53), that state-law characterization of the relationship between Westlands and individual water users could not confer on water users a federal right to sue as third-party beneficiaries to enforce a contract between the United States and Westlands that does not itself confer such a right. And, in any event, petitioners would not have unconditional third-party enforcement rights. A trustee has the exclusive authority to sue parties who injure the beneficiaries' interest in the trust, and a trust beneficiary can sue to enforce a contract entered into on its behalf by the trustee only if the trustee "improperly refuses or neglects to bring an action against the third person." *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 567-568 (1990) (citing 4 William Fratcher, *Scott on Law of Trusts* § 282, at 25-29 (4th ed. 1987), and quoting Restatement (Second) of Trusts § 282(2) (1959)). Petitioners have never attempted to prove in the course of this litigation that they can satisfy that requirement—that is, that Westlands acted improperly by dismissing its complaint against the United States.

evidence of the United States' and Westlands' intent in 1963, the language of that judgment does not support petitioners' characterization.

Petitioners first invoke (Pet. Br. 46-47) Paragraph 4.2 of the 1986 Judgment, in which Westlands "acknowledges that it entered into the [Westlands Contract] for the benefit of the [original Westlands areas] and the lands therein." J.A. 111. But Paragraph 4.2 goes on to identify Westlands ("The District")—and not petitioners —as the party that will enforce "the prior rights of said areas" under the Westlands Contract. *Ibid.* Paragraph 4.2 says nothing about whether the United States and Westlands intended to confer on petitioners any enforcement rights under the Westlands Contract. Thus, Paragraph 4.2 provides no support for petitioners' claim of third-party rights.

Petitioners also rely (Pet. Br. 47) on Paragraph 3 of the 1986 Judgment, which in relevant part preserves the right of any party to the stipulation to seek "appropriate relief * * * against the Federal parties by the filing of a new action for violation of * * * any contract or other right or obligation arising independently of this Judgment." J.A. 110. That language, by its terms, allows petitioners only to enforce whatever unspecified rights already exist "independently" of the 1986 Judgment. It does not grant any new rights or confirm the existence of any specific existing rights. Thus, Paragraph 3 sheds no light on whether petitioners have any third-party enforcement rights.[20]

[20] Petitioners' discussion of Paragraph 23 of the 1986 Judgment (see Pet. Br. 46-47) is likewise beside the point. Paragraph 23 provides: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act." J.A. 146. It says nothing about whether petitioners are intended third-party beneficiaries of the Westlands Contract.

5. The 1986 Judgment has no claim-preclusive or issue-preclusive effect on the matters before this Court

Petitioners further argue (Pet. Br. 48-49) that the 1986 Judgment in *Barcellos* precludes the United States from contesting that petitioners are entitled to enforce the Westlands Contract. They are mistaken.

First, petitioners waived that argument by failing to present it to the district court, which dismissed their suit. See *Arizona* v. *California*, 530 U.S. 392, 408-413 (2000); see also *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). Petitioners contended in the district court that the court could adjudicate their third-party enforcement action under the waiver of sovereign immunity contained in Section 390uu. 43 U.S.C. 390uu. They did not argue that the 1986 Judgment precluded the district court from examining whether they had third-party rights or whether Section 390uu's waiver of sovereign immunity applied. Petitioners' "failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so," forecloses them from raising it now. *Arizona*, 530 U.S. at 413.

Second, even if petitioners preserved that argument for appeal, the 1986 Judgment cannot have any claim-preclusive effect in this case because the claim that Judgment resolved in *Barcellos*, arising from the Secretary's subsequently rescinded 1978 decision to require new water service contracts, differed from petitioners' claim in this case, which arises from reductions of water deliveries on account of CVPIA and ESA requirements. See *Arizona* v. *California* 530 U.S. at 414; *First Pac.*

Bancorp v. *Helfer*, 224 F.3d 1117, 1128 (9th Cir. 2000). Additionally, the 1986 Judgment does not have any relevant issue-preclusive effect because the parties resolved the *Barcellos* claims by stipulation and voluntary dismissal without reaching the merits of the parties' competing contentions. AER 242-297. As a general matter, consent judgments have collateral estoppel effect only to the extent that "the parties intend their agreement to have such an effect." *Arizona* v. *California*, 530 U.S. at 414. See, *e.g.*, *Franco* v. *Selective Ins. Co.*, 184 F.3d 4, 9 (1st Cir. 1999); *La Preferida, Inc.* v. *Cerveceria Modelo*, 914 F.2d 900, 907 (7th Cir. 1990); 18 Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4443, at 251-253 (2d ed. 2002). The 1986 Judgment does not contain any such indication and therefore carries no issue-preclusive effect that is relevant here.

Third, even if petitioners had not waived their preclusion argument, and even if the *Barcellos* litigation had concluded with a judgment on the merits, the *Barcellos* court's interlocutory ruling that it could exercise jurisdiction, 491 F. Supp. at 264-267, would not preclude the district court in this case from considering whether it had jurisdiction over petitioners' claims for alleged breaches of the Westlands Contract.[21] A court's resolution of an issue does not preclude litigation of a later contention unless "the issue decided in the prior adjudication is substantially identical to the issue in the

[21] The *Barcellos* court's April 1980 order denying the federal defendants' motion to dismiss for lack of jurisdiction likewise cannot have preclusive effect because it was merely an interlocutory order that did not result in a final adjudication of the issue. See *Catlin* v. *United States*, 324 U.S. 229, 236 (1945) (holding that the denial of a claim of lack of jurisdiction is a nonappealable interlocutory order).

subsequent action." *Durkin* v. *Shea & Gould*, 92 F.3d 1510, 1516 (9th Cir. 1996).

In *Barcellos*, the district court held that it had jurisdiction on either of two alternate grounds: (1) that the plaintiffs were challenging ultra vires agency action, 491 F. Supp. at 265-266 (citing *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963)), and (2) that the plaintiffs were seeking an adjudication of water rights under the McCarran Amendment, 43 U.S.C. 666(a), 491 F. Supp. at 266-267 (citing *Dugan*, 372 U.S. at 617). In the instant case, by contrast, petitioners asserted that the court had jurisdiction over their third-party enforcement action under the Westlands Contract pursuant to Section 221 of the Reclamation Reform Act of 1982, 43 U.S.C. 390uu. WER 200, 209. Petitioners challenge the district court's rejection of that contention (WER 327-336). The jurisdictional ruling in *Barcellos* and the jurisdictional ruling in this case, which rest on entirely different statutory provisions, do not involve "substantially identical" issues. Indeed, as the district court correctly noted in its June 1998 opinion (WER 201), the statutory provision at issue in the instant case—Section 390uu—was not enacted until 1982, two years after the jurisdictional ruling in *Barcellos*.

Petitioners argue (Pet. Br. 49) that the United States should have objected when individual farmers sought to enforce the 1986 Judgment in subsequent actions. Petitioner overlooks that those actions sought enforcement of the 1986 Judgment. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990); *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993), aff'd, *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir. 1995), cert. denied, 516 U.S. 1028. This case, unlike those suits, is a new

and distinct action that seeks to enforce the Westlands Contract based on non-existent third-party rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant To The Solicitor General
TODD S. AAGAARD
Attorney

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ADDENDUM

Statutory Provisions Involved

1. Section 46 of the Act of May 25, 1926, ch. 383, 44 Stat. 649, as amended, states:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the

Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for

the first year after such public notice shall be transferred to and paid as a part of the construction payment.

43 U.S.C. 423e.

2. Section 221 of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1271, states:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. 390uu.